79-567

RECEIVED
JAN 29 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

UNITED STATES OF AMERICA, Petitioner

vs.

EUGENE DiFRANCESCO, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Eugene DiFrancesco, by his attorney, Edgar C. NeMoyer, moves the Court for an order permitting him to proceed in this Court, in forma pauperis in response to the petition of the Government for a writ of certiorari, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the affidavit of said respondent's attorney.

BOREANAZ, NeMOYER & BAKER
Edgar C. NeMoyer, Of Counsel
Counsel for Respondent
736 Brisbane Building
Buffalo, New York 14203
Telephone (716) 854-5800

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,

Petitioner

v. AFFIDAVIT

EUGENE DiFRANCESCO,

Respondent

UNITED STATES OF AMERICA)
WESTERN DISTRICT OF NEW YORK) :SS

EDGAR C. NeMOYER, being duly sworn, deposes and says that:

1. Your deponent is the attorney in this Court for the defendant, Eugene DiFrancesco, and as such is fully familiar with the facts and circumstances herein.

2. The Respondent herein desires to respond to the petition of the Government to this Court for a writ of certiorari. However, the Respondent, due to his indigency, is unable to afford the substantial printing costs which he would have to incur in filing his Reply Brief.

3. By Order dated December 13, 1979 the United States Court of Appeals for the Second Circuit granted the Respondent's, Eugene DiFrancesco, request for appointed counsel pursuant to the Criminal Justice Act for the purpose of responding to the Government's petition for a writ of certiorari herein. A copy of this Order is attached hereto and made a part hereof. The Respondent is presently incarcerated and has been such for the past few years, and is totally without any funds.

4. As a result of the foregoing, your deponent requests that the Respondent be permitted to proceed in this Court in forma pauperis, and in accordance therewith file the Respondent's Reply Brief pursuant to the mandate of Rule 47 of the Supreme Court Rules.

WHEREFORE, your deponent prays that the Respondent may have leave to proceed in this Court in the manner stated in forma pauperis.

Edgar C. NeMoyer

EDGAR C. NeMOYER

Sworn to before me this
25th day of January, 1980.

Salvatore A Bottaro

SALVATORE A. BOTTARO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 80

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AFFIRMATION OF SERVICE

I hereby certify that this 25th day of January, 1980, I have caused to be served by mail, three copies of the Respondent's Reply Brief to the Petitioner's petition for a writ of certiorari upon Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C., 20530.

Edgar C. NeMoyer

EDGAR C. NeMOYER
Attorney for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

United States of America,

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v.

Eugene DiFrancesco,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1979

No.

UNITED STATES OF AMERICA, Petitioner,

v.

EUGENE DiFRANCESCO, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Solicitor General, on behalf of the United States, has petitioned for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit in this matter.

OPINION BELOW

The opinion of the Court of Appeals is attached to the Petitioner's petition as Appendix A, and can be found in 604 F. 2d 769 (2nd Cir.--1979).

QUESTION PRESENTED

Whether this is a proper case for this Court to grant certiorari to review the Constitutionality of Title 18 United States Code 3576.

STATEMENT

The defendant, Eugene DiFrancesco, was convicted in two trials in the District Court of Western New York. After the two convictions a hearing was held on March 17, 1978, wherein the attorneys for the Government made certain allegations regarding Eugene DiFrancesco but

no testimony was taken. Mr. DiFrancesco's then attorney, Paul Shanahan, said "I have no presentation that I wish to make in connection with this." The Government then submitted a proposed 11 page "Findings of Fact" which Judge Harold T. Burke signed with the exception of striking the following language from the proposed Findings "And that confinement of the defendant for a period longer than that provided for a violation of 18 U.S.C. 1962 (c) or 1962(d) is required for the protection of the public from further criminal conduct by the defendant." The Government in citing a portion of the Judge's findings on pages 6 and 7 of their Petition, Footnote 2, would appear to be attempting to mislead this Court when they state that the Court below found Eugene DiFrancesco "to be a hardened habitual criminal from whom the public must be protected for as long a period as possible".

In sentencing Eugene DiFrancesco, the Judge imposed a sentence far less than the maximum provided and also, directed that the majority of the sentence be served concurrently with time previously imposed on the other conviction. In other words, the Judge's sentence belies a finding by him that Mr. DiFrancesco should be incarcerated for as long a period as possible and supports his obvious intent, in striking the language in the Government's proposed Findings, that the defendant be confined for a period longer than that provided.

Eugene DiFrancesco is presently incarcerated and is indigent.

REASONS FOR DENYING THE PETITION

1. This is not a good case for this Court to decide this issue. Neither Eugene DiFrancesco nor his attorney has any great interest in the long term effect of the Constitutionality of the statute herein involved. The Government is, of course, very interested in preserving

this statute. A proper case, with real parties in interest, will be presented to this Court when a defendant receives an increased sentence on review by a Circuit Court of Appeals. In that situation, a defendant will be directly effected and consequently, motivated to attack the Constitutionality of this statute.

2. The statute involved, namely, Title 18 U.S.C. 3575, provides in (f) "A defendant is dangerous for purposes of this Section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." Obviously here the Judge did not make such a required finding. The sentence actually imposed was much less than that provided for such a felony as charged. It is submitted that the Judge acquiesced in the proposed findings submitted by the Government because in all probability it would make no difference.

3. The Government in their petition cite North Carolina v. Pearce, 395 U.S. 711 (1969) for the proposition that a defendant may be resentenced to a longer term after a retrial then he received at his first trial. The Government appears to place much emphasis on the rationale they attribute to that case, namely, that increased sentencing is not absolutely prohibited by the Constitution. It is submitted that North Carolina v. Pearce, supra, does not in actuality support the Government's position. The Court there stated, at Page 723, "A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" The Court further stated, also at 723, that "The freedom of a sentencing judge to consider the defendant's

conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, **". Here no new information is permitted for the reviewing court. All the information is available for the sentencing judge in imposing his original sentence and therefore, contrary to North Carolina v. Pearce an increased sentence would be based upon the same facts and not as therein provided on new information.

In its reason for granting its petition, the Government claims that the decision of the United States Court of Appeals for the Second Circuit has nullified an act of Congress which "was carefully drafted with constitutional considerations in mind. Page 9. However, a review of the legislative history of 18 U.S.C. 3576 indicates that one of the constitutional factors considered was the fact that this provision may be violative of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The Congressional Committee considering the Dangerous Special Offender Sentencing Statutes, 18 U.S.C. 3575-3578 was itself cognizant of the potential Fifth Amendment ramifications of 18 U.S.C. 3576 when it invited the United States Justice Department to comment upon the American Bar Association recommendations in this area, 1970 United States Code Congressional and Administrative News, P. 4068-4070. The ensuing comments submitted to the Committee by the Justice Department involved a detailed discussion of the Constitutional aspects of 18 U.S.C. 3576, albeit one which supported constitutionality.

However, dissenting views of Representative John Conyers, Jr., Representative Abner Mikva and Representative William F. Ryan presented to the Committee set forth a position that 18 U.S.C. 3576 was in violation of the Double Jeopardy Clause of the Fifth Amendment.

It should not therefore come as a surprise to the Government, when the first Appellate Court requested by the Government to increase a sentence appealed by it, decides that such a procedure is unconstitional. The opinion of the United States Court of Appeals for the Second Circuit is amply supported by legal authority and logic.

The Government argues unconvincingly that 18 U.S.C. 3576 does not permit multiple punishments for the same offense, but clearly establishes a new appellate for use by the Government when it is dissatisfied with the sentencing imposed by the District Court Judge. It therefore affords the Government the ability to obtain on its own initiative an increase in the sentence of the defendant. It is submitted that the Court of Appeals for the Second Circuit was correct when it stated therein. "Therefore, the conclusion appears inescapable that to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the Government is to place him a second time "in jeopary of life and limb." (30a).

In this context it is this Court's words in ex parte Lange, 85 U.S. (18 WALL.) 1963 (1873) at P. 183 which sets forth the Double Jeopardy concept as follows:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronouned on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgement has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a

> case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> The argument ssems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

See also United States v. Benz, 282 U.S. 304 (1931).

The Court of Appeals amply discussed this issue in its opinion, and persuasively held that 18 U.S.C. 3576 created the imposition of multiple punishments upon a defendant, with a resultant double jeopardy violation.

In discussing the issues before it, the Court in Walsh v. Picard, 44 F. 2d 1209 (1st Cir. 1971), referred to the aforementioned concept and stated:

> "As in Pearce, the Massachusetts procedure does not permit the State to reopen the question of sentence on its own initiative. Were it to do so, it would of course violate the proscription against double jeopardy. (id. at 1211).

In United States v. Coke, 404 F. 2d 836 (2nd Cir. en banc, 19) it was held that "no policy of the Double Jeopardy Clause is offended when as a consequence of a retrial of the same offense resulting from proceedings taken by the accused to correct trial error, a higher punishment is imposed." (id at 841). However, the Court did discuss the double jeopardy immunity provided to a defendant on appeal, and it stated that it was:

> "An immunity from having a sentence increased at the instance of the State (id at 844) ...
>
> Where double jeopardy protection is in effect -- and this may be everywhere, Cf. U.S. ex rel. Hetenyi v. Wilkins, 348 F. 2d 844 (2nd Cir. 1965), the Court cannot increase the sentences of prisoners who do not challenge them after these have become final. (id at 845).

The Government's further position that the sentence imposed pursuant to 18 U.S.C. 3575 is not final, is not even supported by the statute itslef. 18 U.S.C. 3575(b) directs that the district court "shall sentence" the defendant accordingly if it is found that he is a dangerous special offender. As the Court of Appeals stated, "this command is not tentative, the sentence imposed is effective immediately." (27a) In Footnote "4" of its petition the Government claims that the original Senate Bill provided that the District Court sentence was "not final", but because of superflousness this label was omitted from the final bill. It is submitted that this omission shows the clear intent of the Congress to make such a sentence final. This statute must be read in accordance with the language in its present form. Such language speaks in terms of a final sentence as perceived by the opinion of the Court of Appeals.

In its third reason for granting the petition herein the Government's reliance upon North Carolina v. Pearce, 395 U.S. 711 (1969) is misplaced. Although the Court in Pearce held that the Double Jeopardy Clause does not prohibit a more severe sentence being imposed upon a defendant after reconviction, this holding in Pearce is premised upon the fact that the original conviction was set aside at the defendant's request. In the present situation one is dealing with a factual background where an increased sentence is sought at the request of the Government. In fact, according to 18 U.S.C. 3576, the Government not only can appeal the sentence but can also force the defendant to appeal his entire conviction:

"The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. 18 U.S.C. 3576

The Court of Appeals' understanding of the Pearce case is both rational and founded within the language of the case itself. For the Goverment to call "untenable" the Court of Appeals' reading of Pearce shows a complete lack of comprehension of the basic tenants of Pearce.

One of the claims of the Government in its petition, is that the Court of Appeals relied primarily on Kepner v. United States, 195 U.S. 100 (1904) (P. 14). To reach such a conclusion is to read the Court of Appeals decision in simplistic terms for the holding in Kepner was only one of the factors which influenced the Court of Appeals. However, Kepner's rejection of the continuing jeopardy concept has application here since it is the respondent's position, as was the Court of Appeals, that subjecting a defendant at Government request, to an increase in punishment violates the Double Jeopardy Clause.

The Government concludes its petition by claiming that 18 U.S.C. 3576 was an Act of Congress which was "neither oppressive nor vindictive" in establishing Appellate supervision over a district court sentencing procedure. Such a statement ignores the entire tenor of 18 U.S.C. 3575 and 18 U.S.C. 3576, the sole purpose of which was to provide for increased incarceration of certain defendants.

The decision of the United States Court of Appeals for the Second Circuit is founded upon sound precedent and logic and should not be subject to review by this Court.

CONCLUSION

The Government's petition for a writ of certiorari should be denied.

Respectfully submitted,

BOREANAZ, NeMOYER & BAKER
Edgar C. NeMoyer, Of Counsel